

DRAINAGE PARTICIPATION AGREEMENT
BETWEEN THE CITY OF COLLEGE STATION AND
301 CHURCH AVENUE L.P.

This Agreement is entered into on this 23rd day of APRIL 2001, by and between the City of College Station, Texas, and 301 Church Avenue, L.P., a Texas Limited Partnership.

WHEREAS, The Tradition owns Lots 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, Blocks 6-7 of the W.C. Boyett Estate Subdivision in College Station, Brazos County, Texas, also known as 301 Church Avenue and more specifically described in the plat filed in the Brazos County Deed Records in Volume 100, Page 440; and

WHEREAS, the City owns Lot 14, Block 5, and Lots 16 - 25, Blocks 6-7 of the W.C. Boyett Estate Subdivision in College Station, Brazos County, Texas, more commonly known as 309 College Main which is being developed as the College Main Parking Garage; and

WHEREAS, The Tradition is required pursuant to CHAPTERS 9 and 13 of the CITY OF COLLEGE STATION CODE OF ORDINANCES and other applicable federal and state laws, rules and regulations to construct stormwater detention to accommodate the stormwater runoff from its property; and

WHEREAS, The Tradition wishes to share the City's detention facility as an offsite drainage facility to accommodate the stormwater runoff from its property thereby allowing The Tradition to have more developable property for its project and save the cost of maintenance of a private detention facility; and

WHEREAS, City is willing to oversize the City's Garage Property detention facility to accommodate the stormwater runoff generated by the Tradition Property to promote economic development and to consolidate areas for stormwater runoff in the Northgate Area under terms and conditions specified in this agreement;

NOW, THEREFORE, in consideration of the recitations hereinabove and the promises and covenants contained hereinbelow, the parties agree as follows:

1. Definitions

1.1 **City** means the City of College Station, Texas, a Home-Rule Municipal Corporation.

1.2 **City Property** means Lot 14, Block 5 and Lots 16 - 25, Blocks 6-7 of the W.C. Boyett Estate Subdivision in College Station, Brazos County, Texas, more commonly known as 309 College Main which is being developed as the College Main Parking Garage.

1.3 **Detention facility** means the City's permanent facility for the temporary storage of stormwater flows which is designed so as not to create a permanent pool of water. The detention facility will be located on Lot 14, Block 5 of the City Property and will detain stormwater from the City's College Main Parking Garage and The Tradition property.

1.4 **Oversize** means the increase in the size of the City's detention facility by 274% to accommodate the stormwater runoff generated by The Tradition dorm based upon the development depicted in the site plan submitted to and approved by City on July 20, 2000, and on file in the City Development Services Department.

1.5 **The Tradition** means 301 Church Avenue L.P., a Texas limited partnership who is the developer of The Tradition Property.

1.6 **The Tradition Property** means Lots 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, Blocks 6-7 of the W.C. Boyett Estate Subdivision in College Station, Brazos County, Texas, also known as 301 Church Avenue and more specifically described in the plat filed in the Brazos County Deed Records in Volume 100, Page 440, owned by The Tradition.

Under the terms and conditions set forth herein, City agrees to oversize the detention facility scheduled for the Garage Property to accommodate the stormwater runoff from The Tradition property.

2. Oversize Design

The Tradition will provide the design for the oversize at its sole cost and expense and pay for the actual cost to construct a revised detention design that will provide sufficient oversize capacity to the City's detention facility to accommodate the stormwater runoff generated by the development of The Tradition dormitory.

The revised design is filed with the Public Works Department and has been reviewed and approved by the City Engineer and the Development Services Department. The Tradition's design reflects that the detention facility must be increased by 274%. The volume of the City's detention facility was 4,542 cubic feet. The oversized detention facility including The Tradition Property is 17,000 cubic feet.

3. Oversize Construction Cost

A construction bid from Vaughn Construction for the oversize work based on the design, plans and specifications is \$76,542.00.

4. Stormwater Runoff Maximum

The Tradition agrees and warrants that it may not introduce any additional stormwater runoff into the detention facility in excess of the oversize in the design specifications and plans for The Tradition Property as approved by City. The site plans, permits and all other information

submitted to and approved by the City of College Station Development Services and City Engineer as of July 20, 2000, is the development upon which the drainage detention oversize design is based.

5. Warranty for Additional Detention Requirement

If upon completion of construction and operation of the drainage facility, the actual stormwater runoff from the property exceeds what is projected by The Tradition's design, then The Tradition warrants and agrees, at its sole cost, to promptly: (i) revise its design (ii) submit the design for review and approval to City and (iii) pay the City to enlarge the detention facility to accommodate The Tradition excess stormwater runoff. If excess capacity is unavailable at the garage detention facility, then The Tradition must design and construct additional detention either on The Tradition dormitory site or at another location offsite to meet its stormwater runoff detention requirements to comply with Chapter 13 of the City of College Station Code of Ordinances and any other applicable law.

If The Tradition fails to promptly design and construct any additional capacity required to accommodate the excess stormwater runoff, then it agrees and understands that it will be in violation of CHAPTER 13 of the CITY OF COLLEGE STATION CODE OF ORDINANCES and the City may initiate any proceedings authorized under Chapter 13 or any other applicable law to bring The Tradition into compliance. Further, the parties herein agree and stipulate that insufficient oversize capacity constitutes a threat to public health and safety and a public nuisance and that the City may seek a mandatory injunction to remedy such noncompliance all at The Tradition's cost and expense, including but not limited to its attorney fees and court costs.

6. Payment.

The Tradition must remit a certified check to the Director of Public Works for the estimated cost of construction for the oversize of City's detention facilities specified in Section 2 not later than ten (10) business days in advance of the commencement of construction. The Tradition's failure to remit the payment required in this Section shall terminate this agreement and City will have no further liability or obligation hereunder except that the City shall return the design, plans and specifications that have been provided by The Tradition. Additionally, The Tradition will not be issued a certificate of occupancy for The Tradition until The Tradition complies with CHAPTER 13 of the CITY OF COLLEGE STATION CODE OF ORDINANCES and any other applicable federal or state law.

At the completion of construction of the detention facility, the City will invoice The Tradition for the balance owed for the actual cost of the oversize, if any. Payment is due within ten (10) business days from the date of the invoice. Payment must be sent to the Director of Public Works at the address noted in Section 7 herein.

7. Invalidity

If any provision of this Agreement shall be held to be invalid, illegal or unenforceable by a court or other tribunal of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. The parties shall use their best efforts to replace the respective provision or provisions of this Agreement with legal terms and conditions approximating the original intent of the parties.

8. Written Notice

Unless otherwise specified, written notice shall be deemed to have been duly served if delivered in person to the individual or to a member of the firm or to any officer of the corporation for whom it is intended or if it is delivered or sent certified mail to the last business address as listed herein. Each party will have the right to change its business address by at least thirty (30) calendar days written notice to the other parties in writing of such change. The addresses of the parties are as follows:

To OWNER: 301 Church Avenue L.P..
Attn: Thomas E. Kirkland, President
7502 Greenville Avenue, Suite 500
Dallas, Texas 75231

To CITY: City of College Station
Attention: Director of Public Works
P.O. Box 9960
College Station, Texas 77842

9. Entire Agreement

It is understood that this Agreement contains the entire Agreement between the parties and supersedes any and all prior agreements, arrangements, or understandings between the parties relating to the subject matter. No oral understandings, statements, promises or inducements contrary to the terms of this Agreement exist. This Agreement cannot be changed or terminated orally. No verbal agreement or conversation with any officer, agent or employee of the City, either before or after the execution of this Agreement, shall affect or modify any of the terms or obligations hereunder.

10. Amendment

No amendment to this Agreement shall be effective and binding unless and until it is reduced to writing and signed by duly authorized representatives of both parties.

11. Texas Law

This Agreement has been made under and shall be governed by the laws of the State of Texas.

12. Place of Performance

Performance and all matters related thereto shall be in Brazos County, Texas, United States of America.

13. Authority to Enter Contract

Each party has the full power and authority to enter into and perform this Agreement, and the person signing this Agreement on behalf of each party has been properly authorized and empowered to enter into this Agreement. The persons executing this Agreement hereby represent that they have been authorized to sign on behalf of their respective corporations, which authorizations are attached hereto and marked Appendix A and Appendix B.

14. Waiver

Failure of any party, at any time, to enforce a provision of this Agreement shall in no way constitute a waiver of that provision, nor in any way affect the validity of this Agreement, any part hereof, or the right of the any party thereafter to enforce each and every provision hereof. No term of this Agreement shall be deemed waived or breach excused unless the waiver shall be in writing and signed by the party claimed to have waived. Furthermore, any consent to or waiver of a breach will not constitute consent to or waiver of or excuse of any other different or subsequent breach.

15. Construction.

This Agreement, and any exhibits hereto, shall be construed without the aid of any canon or rule of law requiring interpretation against the party drafting or causing the drafting of an agreement or the portions of an agreement in question.

16. Assignment

This Agreement shall not be assigned by The Tradition without the prior written consent of City which consent may be granted or withheld for any reason or for no reason.

17. **WARRANTY, INDEMNIFICATION, & RELEASE**

The Tradition unconditionally warrants the sufficiency of the design work and the accuracy of the information used to prepare the design provided under this Agreement. The Tradition warrants that the design work and all information provided by The

Tradition or its representatives, employees, agents, consultants, or contractors reflects the highest professional and industry standards, procedures, and performances. The Tradition warrants the design preparation of drawings, the designation or selection of materials and equipment, the selection and supervision of personnel, and the performance of other services under this Agreement pursuant to a high standard of performance in the profession. The Tradition further warrants that The Tradition and its agents, employees, consultants, or contractors have exercised diligence and due care in all of the services provided pursuant to this Contract. Approval of the City shall not constitute, or be deemed, a release of the responsibility or liability of The Tradition, its employees, agents, or associates for the exercise of skill and diligence to promote the accuracy and competency of their designs, information, plans, specifications or any other document, nor shall the City's approval be deemed to be the assumption of responsibility by the City for any defect or error in the aforesaid documents prepared by The Tradition, its employees, associates, agents, consultants, design professionals or subcontractors.

Upon written notice by City, The Tradition at its sole cost and expense shall promptly correct or cause to be promptly corrected any defective designs or specifications furnished by The Tradition or its contractors, consultants, design professionals, subcontractors, agents or employees, and any resulting cost of construction associated therewith. The City's approval, acceptance, use of all or any part of, The Tradition's design work or of the detention facility itself shall in no way alter The Tradition's obligations or the City's rights hereunder. The Tradition further agrees to pay any damages incurred by the City if the construction project is delayed on account of defective or deficient design work.

The Tradition, its agents, officers, consultants, successors and assigns, agrees to and shall indemnify, hold harmless, and defend the City, its officers, agents, and employees, from and against any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation, court costs, and attorney's fees, for injury to or death of any person or for damage to any property arising out of or in connection with the design or construction work provided by The Tradition, its employees, agents, design professionals, contractors or subcontractors under this Agreement. This indemnity shall apply regardless of whether or not any such damage, loss, injury, sickness, or death is contributed to by the negligence or fault of City. Both the City and The Tradition expressly intend that the indemnity provided hereunder is indemnity by The Tradition to indemnify, defend and protect the City from the consequences of City's own negligence arising out of or in connection with the design and construction of the detention facility, except that The Tradition will indemnify City only for that pro rata portion of liability (based on the percent of negligence) of any such damage, loss, injury, sickness, or death that was not caused by the negligence of City.

The Tradition releases, relinquishes, and discharges the City, its officers, agents, and employees from all claims, demands, and causes of action of every kind and character and including the cost of defense thereof, for any injury to, sickness or death of The Tradition, its employees, and any loss of or damage to any property of The Tradition or its

employees that is caused by or alleged to be caused by, arises out of, or is in connection with the work to be performed hereunder by The Tradition (including but not limited to the City's failure to issue or revocation of a certificate of occupancy for The Tradition Property).

EXECUTED this 23rd day of April, 2001.

301 CHURCH AVENUE, L.P.

CITY OF COLLEGE STATION

BY:


THOMAS E. KIRKLAND
President

Date: 4.23.01

BY:

LYNN McILHANEY, Mayor

Date:

ATTEST:

Connie Hooks, City Secretary

Date:

APPROVED:

Thomas E. Brymer, City Manager

Date:


City Attorney

Date:

Charles Cryan, Director of Fiscal Services

Date:

THE STATE OF TEXAS

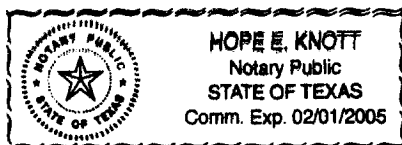
COUNTY OF DALLAS

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CORPORATE ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally Thomas E. Kirkland, President of 301 Church Avenue L.P., a Texas Limited Partnership, and known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 24th of April, 2001.



Hope E. Knott
Notary Public in and for the
State of Texas

THE STATE OF TEXAS

COUNTY OF BRAZOS

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ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared LYNN McILHANEY, as Mayor of the CITY OF COLLEGE STATION, a Texas home rule municipal corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the _____ of _____, 2001.

Notary Public in and for the
State of Texas